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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol,
Respondent.

272

BRIEF OF CLAIMANT-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CASES CITED.

	PAGE
Badger *v.* Ranlett, 106 U. S. 255	4
Baltimore Steamship Co. *v.* Phillips, 274 U. S. 316, 71 Law Ed. 1069	7
Beauregard *v.* City of New Orleans, 18 Howe 497, 502	6
Bronson *v.* Railroad Company, 2 Black 524	11
Daily *v.* Doe, 3 Fed. 903	7
Florentine *v.* Barton, 2 Wall. 210, 216	6
Forgay *v.* Conrad, 6 How. 201	11
Grignon's Lessee *v.* Astor, 2 Howe 319, 343	7
Heine *v.* Board of Levee Commissioners, 22 Law Ed. 225, 226	6
Heyman *v.* United States, 285 Fed. 685	7
Matoil Service & Transport. Co. *v.* United States, No. 410, October Term, 1934	2
Miller *v.* United States, 11 Wall. 268, 294	7
Northern Pacific Railway Co. *v.* Slaght, 205 U. S. 122, 51 Law Ed. 738	7
Shinkle *v.* Vickery, 117 Fed. 916	7
Steele *v.* United States, 267 U. S. 505, 69 Law Ed. 761	7
The New Brunswick, 125 Fed. 567	7
The San Rafael, 149 Fed. 893	7
Thompson *v.* United States, 142 U. S. 471	10
United States *v.* One Ford Coupe, 272 U. S. 321	10
United States of America *v.* Frank Rizzo, Claimant, No. 621, October Term, 1934	2, 3, 4
United States *v.* Ulrici, 111 U. S. 38	10
Winthrop Iron Co. *v.* Meeker, 109 U. S. 180	11

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The Circuit Court of Appeals did not err:

I. In making the order of June 4, 1935 complained of by the petitioner, for the following reasons:

1. By the adjudication of the libel suit, every claim which might have been made by any of the parties to the suit is deemed to have been made and adjudicated.

2. The petitioner never asserted a lien against the alcohol.

3. It was party to the sale of the alcohol free of any lien.

4. The proceeds of the sale represents a fund, no part of which are tax proceeds.

5. A previous petition to this court to review the order of the Circuit Court of Appeals ordering and confirming the sale of the alcohol

"(a) Free and clear of and from any and all claims of any kind or character;

(b) Free of all Government taxes or tax liens of any kind or character;

(c) Free of all customs duties"

was denied.

United States of America v. Frank Rizzo, claimant, No. 621, October Term, 1934.

6. The final decree which provides for the delivery of the proceeds of sale to the claimant was not attacked and its validity was never questioned, and no appeal was taken by the petitioner from said decree.

The writ ought not to be granted.

1. The order of June 4th, 1935, in aid and execution of the final decree rendered October 2, 1934 was proper.

a. The final decree of the District Court drawn and caused to be entered on motion of the proctor for the libellant on June 29th, 1933 (Rec. page 52) provided that upon reversal, "the said proceeds of sale so deposited as aforesaid, in the Registry of this court, shall become the property of and be delivered to the said claimant."

2. The record is devoid of any claim for any alleged tax due, or non-paid against the *res* sold.

(See *Matoil Service & Transport. Co.* v. *U. S.*, October Term, 1934, No. 410, Certiorari denied.)

3. All claims of any interested party in the *res* should have been asserted in the cause after the monition issued, and the world was put upon notice that the court held custody of the alcohol, subject to any claim of any interested party therein. The petitioner claimed forfeiture under the Customs and Navigation Laws and never questioned the validity and correctness of the final decree of the Circuit Court of Appeals.

4. Each and every claim that the libellant had to the subject matter of the libel is presumed to have been raised under the libel, and it may not raise a claim after final decree, the validity of which is not attacked, else

litigation would never terminate and the final decrees of courts would not speak with finality, but would be equivocal and uncertain, and the foundation of the court's powers would be shattered.

5. It is anomalous for the petitioner to make claim for a basic tax after final adjudication and in the face of a specific consent and agreement by stipulation that the cargo of alcohol "is to be sold free and clear of all claims of any kind or character," and sold with "no representation or guarantee of the alcohol as to quality, proof or otherwise."

With these terms agreed upon between the parties to the cause, the Circuit Court of Appeals was induced to make the order carrying out the terms of the said stipulation (Rec. 524).

6. The attack upon the order of sale and the order of confirmation pursuant to the said consent of both parties hereto failed when the petition for the writ of certiorari was denied in *United States* v. *Rizzo, supra.*

Thus it appears that no claim was ever asserted in the libel proceedings for any basic tax. It further appears that no taxes were to be paid by the purchaser of the cargo when sold by the Marshal under the stipulation between the parties hereto. It is paradoxical to claim that although the merchandise which was sold free of any tax and without any claim or any lien of any kind thereon, that the proceeds realized upon the sale could possibly represent any portion of tax proceeds.

7. Each and every claim which the libellant could possibly assert in order to ground forfeiture of the alcohol and in order to assert title in its own behalf, which of course would include a lien for taxes, is deemed, as a matter of law, to have been asserted even though such may be contrary to fact.

8. There is nothing for this court to review which has not already been presented in the previous petitions by the libellant. The right of the Circuit Court of Appeals to enter the order directing the sale of the alcohol free of any claims of any kind or character, including the alleged tax, has been challenged by an attempt to invoke this court's supervisory jurisdiction over the orders and decrees of the Circuit Court of Appeals. But on the showing made that the orders were consented to by a stipulation, and on the further showing that the final decree was conceded to be correct, coupled with the further showing that no tax claim was made under the libel, this court denied certiorari. The claim for a tax was never made before a competent court of original jurisdiction to hear and determine it on any issues drawn and evidence taken.

It is well settled by this court that it will not consider a question which had not been properly presented and raised in the court below.

Badger v. *Ranlett,* 106 U. S. 255, etc.

ARGUM

The libellant in its petition at page 5 states:

> "A petition for a writ of certiorari, wherein was questioned the authority of the Circuit Court of Appeals to include such provisions in its order of confirmations, was denied by this court on January 21, 1935.
>
> *United States* v. *Frank Rizzo,* Claimant of 146,157 Gallons of Alcohol, October Term, 1934, No. 621."

The provisions referred to are those ordering the sale of the cargo of alcohol free and clear of all claims of any kind or character.

In effect, this petition seeks the precise relief which was requested when previously this court denied the libellant's petition, No. 621, for the petitioner now asks that

this court find as a fact that the proceeds of the sale of the alcohol which was sold free of tax, nevertheless is stamped with a tax lien.

It is suggested on page 2 of the Government's Brief that the court ordered the sale free of Internal Revenue Taxes and then the Government propounds as a question:

> "1. Has the Government lost its right to assert against the proceeds of sale a claim for Internal Revenue Taxes due on the alcohol before the sale by not asserting such claim in its libel for forfeiture?"

On the record before this court this question is not properly presented. The question pre-supposes that taxes were due on the alcohol, while the record discloses that the alcohol, by agreement of the parties was to be sold free and clear of any claim of any character. There is no denial of such agreement, the petitioner stating, however;

At page 11, Petitioner's Brief:

> "The agreement to the terms of sale, referred to in the court's order of December 4, 1934, did not indicate or imply any relinquishment by the Government or the claimant of their respective rights, or claimant's to the proceeds of sale."

This statement, of course, is a complete confession by the petitioner that the terms of sale were ordered by the court upon agreement.

The second question sought to be presented by the Government reads as follows:

Page 2, Government's Brief:

> "Has the Government lost its right to assert against the proceeds of sale a claim for Internal Revenue Taxes *due* on the alcohol, by awaiting the outcome of the forfeiture proceeding before asserting the claim for tax?"

This question is infected with the same vice that infects the first question.

The third and last question which is sought to be presented reads as follows:

> Page 2, Government's Brief:
>
> "Did the Government lien which attached to the alcohol before sale thereafter attach to the proceeds of sale?"

This question, too, pre-supposes that there was a tax due and unpaid upon the said alcohol by reason of which a lien existed thereon. The record, however, indicates quite clearly that there was no lien of any character, no claim of any kind against the alcohol, and hence, there could be no lien which could attach to the proceeds of the sale of such alcohol.

And as stated by this court in *Heine* v. *Board of Levee Commissioners,* 22 Law Ed., 225 at p. 226:

> "And it is too clear for argument that taxes not assessed are no liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed."

After agreeing to the terms of sale, after specifically relying upon the definite causes of forfeiture pleaded in the libel, after an adjudication in favor of the claimant, when the entire world had been put upon notice of the seizure *in rem,* and when the seizor was the Government itself, the Government now makes a claim for an alleged tax, which by the Government's own stipulation it did not have, nor did it purport to assert or make claim for, and this after the Supreme Court had denied the Government's application for a writ of certiorari.

See

Florentine v. *Barton,* 2 Wall. 210, 216;

Beauregard v. *City of New Orleans,* 18 Howe. 497, 502;

Miller v. *United States,* 11 Wall. 268, 294;
Grignon's Lessee v. *Astor,* 2 Howe 319, 343;
Daily v. *Doe,* 3 Fed. 903.

The petitioner claims that the Circuit Court of Appeals erred:

Page 7:

"1. In holding in effect that the United States failed to assert a claim for taxes on the alcohol by not asserting it in the original libel for forfeiture."

There is no question of waiver in the case at bar. By the adjudication of the libel suit, every claim which might have been made by any of the parties to the suit is deemed to have been made and adjudicated.

Northern Pacific Railway Co. v. *Slaght,* 205 U. S. 122, 51 Law Ed. 738;
Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 71 Law Ed. 1069;
Steele v. *United States,* 267 U. S. 505, 69 Law Ed. 761;
The San Rafael, 149 Fed. 893;
Shinkle v. *Vickery,* 117 Fed. 916;
The New Brunswick, 125 Fed. 567.

The other alleged errors of the Circuit Court of Appeals claimed by the petitioner on page 7 are practically restatements of its first alleged error.

But, the petitioner never asserted a lien against the alcohol. It was party to a sale of the alcohol free of any lien. The proceeds of the sale represents a fund, no part of which are tax proceeds.

Contrast *Heyman* v. *United States,* 285 Fed. 685 relied upon by the petitioner, where the court states at page 686:

"The Referee found, and this finding was also confirmed by the Judge, that the Trustees added to the price the sum of $2.10 per gallon, being the

amount of the tax, and that they thus collected the tax, not eo nomine, but in effect. This the Trustees dispute. But the finding of the Referee, who heard the conflicting testimony of the witnesses, was supported by substantial evidence and the record here presented does not suffice to overcome the presumption of correctness which attaches to such a finding confirmed by the District Judge."

Page 688:

"* * * For the declared purpose of obtaining this advantage they did, under an erroneous ex parte order of the Referee, *made on their application and to which the United States was not a party,* sell the liquor as and for tax free and the purchasers bought it as such.

The latter paid for it, in addition to the price they would have paid had the sale been properly made, an amount equal to the tax. This the Trustees in bankruptcy received, and the fund is now in court for distribution to whomsoever it justly belongs."

The Court held at page 688:

"In good conscience the court could not make the purchasers pay the tax again, nor can it permit the Trustees to retain the fund accumulated under an erroneous order of sale contrary to the rights of the Government, *which was then no party to the proceeding.* Further, in conscience, the Government is entitled to this fund. It does in effect, represent the tax."

Of course, in the case at bar, the Government is a party to the stipulation ordering the sale free of any claim of any character whatsoever and the proceeds does not, in effect, represent the tax. Indeed, the alleged tax itself is more than double the amount of the proceeds in the Registry of the court, and if the Government were permitted to succeed, the claimant would be deprived of the just fruits of the decree in his favor.

At page 12 of Government's Brief, we find the following amazing mis-statement:

> "The only effect of the order of confirmation of sale was that the court determined that the price bid was the best price obtainable for the same; and when the court directed that the alcohol be delivered to the purchaser free and clear of all government taxes and tax liens, it clearly indicated the fact that no taxes had been paid, and by directing the proceeds of sale to be deposited in its registry created a fund out of which the taxes, so far as possible, should be paid."

The conclusion to be drawn from the sale of the alcohol, tax free, as a result of the stipulation of counsel, is either that the taxes had been paid, or that no tax would be claimed. The entry of the order of June 4, 1935, complained of by the petitioner, is conclusive proof that there is no basis for the presumptions indulged in by the petitioner with respect to the court's intentions and determinations by the order of confirmation. Furthermore, there was no necessity for any determination with respect specifically to any taxes on the alcohol. There was no claim for tax, and the Government consented that the alcohol be sold free of any claim.

There being no claim for a tax on the alcohol, how can the Government, which was a party to the proceeding and a stipulator, make claim against the proceeds which cannot even satisfy one-half of the lien alleged and which would deny to the claimant his full interest in the proceeds, no part of which represents tax. The sale of the alcohol free of any claim of taxes makes unconscionable this belated claim to the proceeds of the sale and would work a grave injustice to the successful claimant who would be deprived of the value of the *res*.

Much is made of the fact that the Government did not assert its claim for tax because it did not know who the owner of the alcohol was and because it denied that Rizzo

was the owner thereof. This contention is fatuous. It is unnecessary to know who the owner of alcohol may be to assert a tax lien upon the *res*.

As correctly stated by the Government in its petition, page 13:

> "That the United States has a lien on *Distilled spirits* for the amount of the tax due thereon until paid, has been held by this court."
>
> *Thompson* v. *U. S.*, 142 U. S. 471;
> *United States* v. *One Ford Coupe*, 272 U. S. 321;
> *United States* v. *Ulrici*, 111 U. S. 38.

And as stated by the petitioner in its petition, page 13:

> "By section 3251 of the Revised Statutes (U. S. C., title 26, Sec. 249) the tax is declared to be a first lien *on the spirits* until the tax is paid."

To give color to the belated claim of the petitioner for an alleged tax, petitioner states at page 8:

> "But if in the forfeiture proceedings it should be finally determined that the claimant was the owner of the alcohol, then the liability of claimant for payment of tax on the alcohol would thereupon arise."

The Government, however, is seeking to assert a lien on the proceeds of the sale, the theory being that the alcohol was subject to tax. The reason advanced for this about face upon the part of the petitioner is untenable. Plainly, the petitioner agreed that the alcohol was not subject to a tax. That the Government wanted all or nothing by the assertion of its forfeiture claim. Having failed in this, it attempts to break up into component parts the claim for the whole and litigate anew a claim for the part.

In the previous petition, which was denied, the Government at page 2 sought to present the following question:

> "Whether a court has authority to order the sale (as perishable) of a cargo of alcohol intended

for beverage purposes, free and clear of all revenue taxes, *when such taxes have not been paid, and,* in confirming the sale, to order that the alcohol shall be treated by the Government as tax-paid, and to direct the United States Marshal to place appropriate notices to that effect upon the containers."

The Government, in the said petition (page 4), contended that the court erred:

"1. In ordering the alcohol herein sold free and clear of all claims of every character, including internal revenue taxes.

2. In entering an order confirming the sale of the alcohol tax-free and directing:

(a) That it should be delivered to the purchaser and considered by all the branches of the Government as tax-paid.

(b) That the Marshal should place upon the containers a notice indicating its tax-paid condition in place of the stamps required by the internal revenue laws."

The said petition further sets forth (page 5):

"The orders complained of were entered by the Circuit Court of Appeals subsequent to the final decree in this cause. They amount to an execution of one of the alternative provisions of that decree and are final *in that nothing remains to be done except the ministerial act of delivering the proceeds of sale to the claimant.*

Cf. Forgay v. *Conrad,* 6 How. 201;
Bronson v. *Railroad Company,* 2 Black 524;
Winthrop Iron Co. v. *Meeker,* 109 U. S. 180."

From the foregoing, it is apparent that the Government then took the position that a denial of the previous petition would leave nothing to be done except the ministerial act of delivering the proceeds of the sale to the claimant.

The petitioner complained of the court's order of sale in its previous petition, which was denied. It was pointed out by the petitioner, which procured a stay of the confirmation of sale pending the determination of its petition, that if the sale were confirmed upon the terms of the order of the Circuit Court of Appeals, that the Government would lose its right to assert any claim for taxes. The order of confirmation was entered, as the petition was denied and the stay dissolved. Now, the petitioner takes the position that the claim for taxes is made at this belated hour because the position was taken that Rizzo was not the owner. No lien having been asserted upon the cargo, none can attach to the proceeds. No claim having been made for taxes in the libel suit, none can be made now. In the face of the agreement of the petitioner that no claim of any kind whatsoever exists against the cargo other than those asserted in the libel, it makes it unconscionable for the petitioner to attempt to render nugatory the final decree of the Circuit Court of Appeals by attempting to take the complete subject matter awarded to the claimant away from him, and divert it to the Government on a pure assumption that they constitute taxes, which is contrary to the fact as disclosed by the record, contrary to the law as held by the Circuit Court of Appeals and by this court, and is in plain defiance of the Government's own stand.

Wherefore, it is respectfully prayed that the petition for the writ of certiorari be denied.

Respectfully submitted,

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